No. 03-95

MAR 1 - 2004

IN THE

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA STATE POLICE,
Petitioner

v.

NANCY DREW SUDERS,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

DON BAILEY
Bailey Stretton & Ostrowski
4311 N. 6th Street
Harrisburg, PA 17110
(717) 221-9500
Counsel of Record

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STATEMENT OF THE CASE

Nancy Suders lives in McConnellsburg, a small town located in rural Fulton County, Pennsylvania. She is a relatively young grandmother, who raised three children, and devoted her entire life to her family and her community. As a loyal and active Republican Committeewoman she was also involved, on a local level, in the politics of Fulton County. On or about 1997, Nancy, who had worked for many years as Deputy Sheriff in Fulton County, where she essentially ran the office, was approached by her Republican Chairman and asked to apply for a position as a public communications officer in the Pennsylvania State Police (PSP) barracks in McConnellsburg, Record 55, Suders' Depo. Pgs 10-13 . After discussions with family, the sheriff, and friends, Nancy Suders decided to give the job try, Record 55, Suders' Depo. Pg 13. After submitting her application, Nancy was approved and reported to work on March 21, 1998, Record 55, Suders' Depo. Pg 13; Record 56-58, Suders' Depo. Pgs 23-24. For reasons that are not entirely clear, the PSP cadre at the McConnellsburg barracks didn't want her, Suders' Depo. App 64-66; 89. The record indicates they wanted to make their own selection.

The advantages to the job were many. It paid considerably more than the deputy sheriff's position Nancy held, and there were many opportunities for advancement Record 58, Suders' Depo pg 25; Record 59, Suders' Depo pg 26. Because of these attractive features, the local PSP cadre were opposed to Nancy taking the job. Simply put, they wanted to personally pick who worked under them. Shortly after Nancy began working, she was subjected to egregious treatment at the hands of her supervisors, Sergeant Easton,

and Corporals Baker and Prendergast who were defendants below. App 66-68, Suders' Depo; Record 86, Suders' Depo. Pg 137.

The harassment she suffered took many forms. But most of it was undoubtedly sexual in nature, App 93, Suders' Depo. From the evidence collected below, Nancy Suders suffered egregious sexual harassment over a period of many months at the hands of her supervisors until she could endure it no more, Record 83, Suders' Depo. Pg 122; Record 96, Suders' Depo. Pg 177. She was even approached, at times, in a seemingly solicitatious way, as if suggesting oral sex, that she viewed as in all likelihood, but another form of the persistent outrageous misconduct directed at her that was apparently meant to intimidate, threaten, ostracize, confuse, and offend her, so that she would be driven from the job, Suders' Depo: App 71, 73-74, 78, 81, 84-86, 99, 102. The supervisors eventually succeeded.

Sergeant Easton began by intimidating Nancy with the warning that whatever developed through her employment, it had would be her word against his, and he had friends in high places, App 71, Suders' Depo. This was said while Easton informed Nancy Suders that he had doubts about her, even though he was not acquainted with her, and had no experience with her as an employee, Suders' Depo: App 71-72, 84.

Suders alleges that Easton would constantly talk about bestiality, particularly on those occasions when Nancy had to go into his office, Suders' Depo: App 70, 73, 82, 93. And Easton would roll up to her in his office chair, while wearing spandex shorts, and would lean back with his hands behind his head and spread his legs, App 70, Suders' Depo. She was offended, intimidated, and frightened, and would

move away, Suders' Depo: App 70, 73. On one occasion, which was particularly upsetting to Nancy, Easton and Prendergast had a discussion in Nancy's presence where they discussed their views on parenting, saying that " if someone had a daughter they should teach her how to give a good blow job" ostensibly because that would bring her success in life, and cause her to be accepted, Suders' Depo: App 72, 82. Prendergast, a self-styled ladies man would persistently asked Suders what her daughter's name was, Suders' Depo: App 90-91. This was obviously meant to frightened and intimidate Suders. Prendergast had a reputation for liking young girls, App 91, Suders' Depo.

This type of occurrence, involving all three individual petitioners, was common, being essentially a daily happening Suders' Depo: App 75, 83-84. Corporal Baker would engage in what he called a "wrestling move" where he would cross his arms at the wrist in front of his body, and taking his genitals in his hands, would scream out "suck it", Suders' Depo: App 67, 74-76. According to Suders he would do this as often as a half a dozen times a shift, frequently jumping from a sitting position to his feet, or up onto a chair, to perform the act, Suders' Depo: App 75, 77. Although Baker denied doing this, along with talking about his wife's breasts and getting his penis pierced, App 81, it was witnessed by a number of other people Record 70, Suders' Depo. Typically though, Nancy, would be at the barracks on a later shift, and she would be there with the petitioners by herself App 67, Suders' Depo. Baker would even ask Suders, who he dubbed the "Nancinator" as a way to harass her, to perform the 'wrestling move" as he did, Suders' Depo: App 74-75. Her protestations to him about

this, and other misconduct, were ignored, Suders' Depo: App78-79.

Prendergast, another Corporal, would also engage in harassing conduct. It is alleged that Prendergast was proud of being likened to a Nazi storm trooper. According to Suders he would wear thin black leather gloves and he would sometimes pound things, bringing his fist down with great force on furniture and cabinets so as to frighten her. While supervising Nancy, Prendergast would position himself so that he could watch TV and look, to his right, directly at Nancy as she worked all the while telling her that he didn't trust her, Suders' Depo: App 73, 84-85, 88-90. He would do this sometimes for hours, or a whole shift. This was terribly unnerving and intimidating. The aforementioned behavior by all the individual petitioners was persistent and pervasive, and it was by no means exclusive, App 99, Suders' Depo; Record 83, Suders' Depo. Pg 122; 85 Suders' Depo. Pg 132.

For example, Baker would call Nancy "momma" knowing she was offended by this, App 69, Suders' Depo. Easton also belittled Nancy about her age on a number of occasions. More than once Nancy had seen at least one of her supervisors with some of the much younger ladies in the barracks in their embrace, including pressing their bodies up against them against the wall, Suders' Depo: App 91-92.

Nancy Suders alleges she had no way, or where, to go to complain to her immediate supervisors, the individual supervisor defendants below, Suders' Depo: App 75, 82. Although they were her supervisors, and directly above her in the chain of command, they were her tormentors also. She could not trust or rely upon them, and, of course, she could not confide in them or seek their counsel, App 75, Suders' Depo. She had privately consulted her husband, and some

close friends and associates, about what to do, App 82, Suders' Depo.

One result was that she took a test which she hoped would enable her to move to a barracks approximately 50 mi. to the north, so that she could escape the mistreatment she was suffering. However, when she repeatedly asked for the test results, or whether it had been graded or returned, she was told it had been mailed in and her supervisors had not heard back, App 115, Suders' Depo; Record 90-91, Suders' Depo. One night, as Nancy was using the ladies room, which contained a dresser with unmarked drawers, a commode, a sink, and a bed, she noticed a drawer partly opened and was curious of its contents. Upon opening the drawer, which had thong bikinis, fancy bras, and lingerie in it, Nancy noticed a manila envelope which resembled the envelope she had put her test in. She removed it from the drawer and quickly discovered it contained her test, App 117, Suders' Depo. This was the same test she had turned into her supervisors, and which she had been told had been submitted for review to the headquarters above. Because of the environment at the barracks that night Nancy could not return the test to the drawer right away. She retained the test, which she believed to be her property and placed blank paper in the manila envelope, App 119, Suders' Depo. The next time she came to work she attempted to return the manila envelope to the dresser drawer in the ladies room.

Meanwhile, Nancy Suders was able to reach the PSP anti- discrimination and affirmative action officer Major Virginia Smith Elliott, Suders' Depo: App 83, 88, 94, 95. She called looking for help, Suders' Depo: App, 95, 96, 102. Ms. Elliott remembers that Nancy called her, Virginia Smith Elliot Depo: Record 263, 264. She remembered that Nancy

had complained about mistreatment but could not recollect whether Nancy had mentioned sexual harassment explicitly, App 54, Suders' Depo; Record 52, Suders' Depo. Her testimony is nonetheless telling. Aside from telling Nancy to look up a form she did nothing, App 96, Suders' Depo. Nancy remembered that Ms. Elliott was uninterested, and didn't care anything about her, Suders' Depo: App 96, 97; Record 96, Suders' Depo. Suders, not receiving any help from Elliott, found a form, □lbeit not the correct one, but in good-faith submitted it anyway, App 97, Suders' Depo; Record 96, Suders' Depo. Elliott could only testify that the PSP sexual harassment policy would have been posted throughout the PSP system and that the form which purportedly could be used for filing a harassment complaint "would" be in manuals at the barracks, Suders' Depo: App 55, 56, 62; Record 270, Virginia Smith Elliot Depo. Nancy could not find the forms. She began to feel desperate, Record 96, Suders' Depo.

Feeling frightened and isolated, Nancy Suders had penned a resignation letter, and she had it in her purse the night that she attempted to return her test results, or rather the manila envelope, to the dresser drawer in the ladies room. Later, her supervisors would testify, that the dresser drawers in the ladies room had been assigned to individual staff members. Nancy emphatically denies that. At no time however, did they suggest that the test was not Nancy's, or that the dresser drawer was a filing cabinet, but they did decide to investigate Nancy. They dusted the ladies room with blue theft powder, even doing up the seat and handle on the commode the reason, for which has never been explained. They did this because they quite obviously knew that Nancy's test results had never been sent into

headquarters at all, that they had instead been secretly stored in the bathroom, presumably by one of the young lady staffers, at the behest of Nancy's supervisors, Suders' Depo: Record 90, 93. Regardless, Nancy first saw the theft powder when she noticed little droplets of blue in the commode, App 98, Suders' Depo; Record 92-93, Suders' Depo. But she didn't know what it was. And as she washed her hands to leave the bathroom her hands turned blue. Still confused, Nancy attempted to clean her hands when she was noticed by her supervisors, App 100-101, Suders' Depo.

What followed for Nancy Suders was a traumatizing nightmare. Sergeant Easton was called in. Nancy was questioned, she was read her Miranda rights, App 105, Suders' Depo. She consistently asked if she could leave. She was consistently told no, Suders' Depo: App 101, 105. She was unlawfully ordered to stay, and was told that she had committed a crime and would be prosecuted, Suders' Depo: App 101, 103-104; Record 95, Suders' Depo By this time Nancy was extremely afraid and in emotional turmoil, App 106, Suders' Depo. Her hands were badly shaking and she began to contemplate being taken off to jail and not being allowed to communicate with her husband, App 104, Suders' Depo. Nancy felt she couldn't take it anymore and resignation was a way out, App 101, Suders' Depo. So she produced the resignation letter attempting to use it as a bargaining chip for freedom, because she knew that her supervisor' s desire to get rid of her was behind what had happened to her, Suders' Depo: App 101, 105-106. Initially Baker had refused to accept the resignation letter, but after her rights were read to her, and she had been repeatedly threatened with criminal charges and prosecution, Easton

finally accepted the resignation letter and Nancy was allowed to leave.

She never heard another word about any criminal investigation or prosecution, Record 95, Suders' Depo. She contends that this is because the threats of criminal prosecution were totally baseless, as indeed the record indicates, since Nancy could hardly have been charged with stealing her own test papers, about which she had been lied to by these same supervisors, and which she had found in a lingerie drawer in the bathroom. The date was August 20, 1998, App 102, Suders' Depo.

At some time shortly after Nancy left the employee of the PSP and they became aware of her charges against the Department and her supervisors, they claim to have conducted an internal investigation, Record 230, Easton's Depo. Pg 71. In doing the investigation, according to the testimony of Sergeant Easton, petitioner PSP(the investigating officer was Lieutenant Charlie Way) interviewed Easton and the other defendants below. The PSP reached a conclusion that the allegations against Easton, Baker, and Prendergast were unfounded, Record 230, Easton's Depo. Pgs 72, 73. At no time did any PSP investigator even contact Nancy Suders for an interview, nor did they seek any recommendations for witnesses from her. The total respect paid by petitioner PSP to the allegations made by Nancy Suders was a secretive and truncated pseudo investigation which they refused to disclose in the litigation below. See Record 230, Easton's Depo. Pgs 71-73. This, despite the fact that it was Easton himself who placed Nancy Suders' test results in an envelope, which he then placed in a dresser drawer, in the lady's bathroom at the police barracks, Record 230, Easton's Depo. Pg 70. Easton even told one of

the young lady staffers, Stacey Gelvin, that he was placing Nancy s test results in the drawer. A few sentences later, on page 71 of his deposition (Record 230) Easton admitted he didn't know who's drawer was who's in the bathroom. If petitioner had discovered this during their so-called investigation, they would have had to conclude immediately that the criminal investigation and custodial detention of Nancy Suders was unlawful.

In any event, within a week of her August 20, 1998 constructive discharge, Nancy Suders had consulted with counsel and had called the Pennsylvania Human Relations Commission, which has an agreement with the EEOC to cross file claims. She was scheduled for a September intake session. The underlying litigation followed. Nancy was issued a right to sue letter once her initial complaint was filed in Federal District Court. It was predicated on 1st and 4th Amendment grounds, but ironically, only the Title VII action against petitioner survived. By the time this litigation arrived in the United States Supreme Court, the sole party remaining was the Pennsylvania State Police, pursuant to a Title VII claim, on a theory of vicarious liability. Suders alleged that a constructive discharge made it impossible for her to utilize purported PSP complaint procedures beyond the steps she took as described above. However, the District Court summarily dismissed Nancy's claim for an unreasonable failure to take advantage of alleged internal PSP policies, as per its interpretation of the affirmative defense available in *Faragher v. City of Boca Raton*, 529 U.S. 775 if (1998). The United States Court of Appeals for the Third Circuit reversed the District Court as follows: "...we hold that a constructive discharge, when proved, constitutes a tangible employment action within the meaning

of *Ellerth* and *Faragher*. Consequently, when an employee has raised a genuine issue of material fact as to a claim of constructive discharge, an employer may not assert, or otherwise rely on, the affirmative defense in support of its motion for summary judgment". Pet. App. 5a. The Third Circuit also held that there were disputed material facts as to the issue of Nancy Suders failing to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise(the second prong of the *Ellerth/Faragher* affirmative defense), "We hold that Suders has raised genuine issues of material fact relating to her claim of constructive discharge that preclude the grant of summary judgment." Pet. App 28a. See contra the opinion of the District Court at Pet. App. 80a-81a. The District Court had failed to even address the issue of constructive discharge expressly raised by respondent in her complaint.

SUMMARY OF THE ARGUMENT

Petitioner correctly states the law of *Ellerth/Faragher* when it argues that an employer is vicariously liable for " tangible employment actions" which " fall within the " special province of the supervisor ... as a distinct class of agent". Petitioner then argues that the situation is less clear when the supervisor creates a hostile work environment so severe that the employee is forced to resign because there is not an official firing. Respondent argues that the purpose of the affirmative defense is defeated when it is available to an employer whose supervisor causes a constructive discharge.

The Third Circuit opinion appealed from is extremely thorough, well argued, and impeccably annotated. To hold that a constructive discharge is a " tangible employment actions" is consistent with this Court's ruling in the *Ellerth/Faragher* cases even though it was not listed in the

litany provided. When addressing the affirmative defense The reason is simple. When this Court said " firing" it meant "a discharge" which, consistent with jurisprudence at federal and state levels throughout the nation, recognizes a constructive discharge as the functional equivalent of a "firing" or discharge.

Moreover, there is no logical reason, once a constructive discharge is proven, to categorize it differently from a sex discrimination firing. The Third Circuit opinion is well reasoned and should be adopted by this court. Respondent has found it to be impossible to improve on the Third Circuit opinion. The Petitioner is using this appeal opportunity to seek a more absolute defense for an employer to a supervisors harassment that forces an involuntary quitting by distorting the purpose of the affirmative defense in the *Ellerth/Faragher* cases by purporting to avoid Agency principles in favor of an "official act" analysis.

ARGUMENT

I. Introduction: Agency law and Title VII in *Ellerth/Faragher*, and whether this Court should hold that a constructive discharge, when proven, is a "tangible employment action".

The present case has its genesis in this Court's landmark decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U. S. 775 (1998). Hereinafter *Ellerth/Faragher* . More specifically, the cases at bar deals primarily with two holdings in those cases. What a "tangible employment action" is, *Ellerth*, 524 U.S. at 761-62, *Faragher*, 524 U.S. at

808, i.e. does it include constructive discharges, and the invocation of the affirmative defense promulgated therein, which in formal discharge cases, is denied, *Ellerth*, 524 US at 765; *Faragher*, at 524 U. S. at 807. The " Question Presented" is whether the affirmative defense is available to employer defendants in constructive discharge situations when proven. The Third Circuit Court of Appeals reversed the district court after it granted summary judgment against respondent holding that she had unreasonably failed to take advantage of an employer antidiscrimination policy. The district court never considered the concept of constructive discharge based upon its interpretation of *Ellerth/Faragher*, and the Third Circuit in response held that the district court erred for two reasons:

> " First, even if the PA state police could assert the affirmative defense, disputed issues of fact relating to the defense preclude summary judgment here. While the PA State Police contended that it had an effective remedial program in place to address sexual restaurant claims, Suders never found the complaint form necessary to trigger an investigation. Moreover, Suders contacted Smith Elliott twice. The first time, Suders alluded to potential problems and stated that she might need assistance. No attempt was made to follow-up on Suder's initial contact. The second time, Suders contended that Smith Elliott was entirely unhelpful, appearing insensitive at times. On this record it is unclear whether the PA State police

> exercised reasonable care to prevent or correct the sexual harassment that Suders claimed she suffered. Accordingly, the grant of summary judgment on the basis of the affirmative defense was improper.
>
> Second, and more importantly, the court did not consider Suders claim of constructive discharge and whether a claim of constructive discharge would affect the availability of the affirmative defense." Order appealed from Pet. App. 20a.

When petitioner appealed this matter, in stating its reasons for this court to grant the appeal, it correctly argued that the Circuits were divided over the issue of whether a constructive discharge is a "tangible employment action", because if it were it would bar the affirmative defense outlined in *Ellerth/Faragher*.

Petitioner now argues that a hostile environment injury, because it can be inflicted by co-workers, and not just by a supervisor, cannot be an intangible employment action as per *Ellerth/Faragher* because it's not an "official action" i.e. does not bear the "imprimatur of the enterprise", *Ellerth* 524 U.S. at 762.

This argument, whetted by this Court' s novel decision to impose a burden on employees under the second prong of the affirmative defense promulgated in *Ellerth/Faragher* (*Ellerth*, 524 U.S. at 765; *Faragher* 524 U.S. at 807-808) is really designed to circumvent *Ellerth/Faragher*, by suggesting a 'scope of employment' rule, or some similar construct to replace the clearly established vicarious liability "if aided by the agency relation standard", set forth in *Ellerth*, 524 U.S. at 759. It is clearly

an attempt by petitioner and their amicae to roll back this Court's integration of the Restatement (Second) of Agency section 219 (2), and agency principles, which was designed to accommodate vicarious liability implications and encourage employer responsibility where a supervisor egregiously mistreats or dismisses an employee, by converting the agency principles component of the law of Ellerth/Faragher into an "official act" analysis. And under that analysis employers would be held guiltless of their supervisors abuses no matter how horrific and no matter how destructive of the carrot approach used in the affirmative defense based ostensibly, on their being unauthorized to act by their supervisors. It is a circuitous argument where a supervisor is empowered to summarily dismiss an employee but ht employee cannot complain of the dismissal because the supervisors did not act with authority. It is, simply put, a tautology. It is an argument which hopes to do away with the use of the affirmative defense in hostile environment injury cases in favor of a scope of employment defense to be used against plaintiffs as an explanation for errant supervisors, i.e. it is a poorly disguised attempt to hold employers harmless for the acts of their supervisors where the employee is defenseless to do anything about it particularly where the supervisor, through harassment, forces an employee to quit against their will. Using the opportunity to address this court's definition of tangible employment action" to test whether that definition includes "constructive discharges" the petitioner and their amicae use the concept of the "official act" to climb out of the hole they are in, on a slant.

In other words petitioner's, and the Solicitor General's position, along with that of other amicus curiae

who support petitioner, is a collateral attack on this Court's unambiguous holding in the *Ellerth/Faragher* cases that agency principles apply in Title VII law, as authorized by Congress, and that pursuant thereto, vicarious liability can be imposed upon an employer (even where higher officials in the company are personally innocent of responsibility for creating the hostile environment), when a tangible employment action" (discharge) occurs as the final hostile act sexual-harassment case that creates, as here, a constructive discharge. They are using the simple holding of the Third Circuit that a proven constructive discharge is a tangible employment action to wedge the door open against any liability for the employer.

Title VII law becomes factually and legally more complicated at this point because the law typically separates hostile environment claims from simple discrimination claims i.e. where an employee is discharged because of their sex as opposed to where the employee is merely harassed and an ongoing private remedy is presumably being pursued. In a nutshell, a formal discharge in a hostile environment case denies an employer access to the E/F affirmative defense, because as a non-employee victim, the employee cannot utilize, or exhaust, any private remedies available. This is not to say or imply that there is any exhaustion requirement in the law for the private remedial scheme's of employers-there is none. On the other hand, should a "constructive discharge" be a tangible employment action? It has not been clear whether the affirmative defense is available as a defense to vicarious liability in such cases. The Circuits differ markedly. The Third Circuit has decided that the defense is not available, see Pet. App. 38a-43a.

The Supreme Court, intending to soften the impact of *Ellerth/Faragher* vicarious liability on employers and recognizing there should be some reward for employers who instituted good antidiscrimination programs and properly enforce them, placed the burden on employees to not only utilize those plans, but tangentially encourage those employees to stay on the job and use them in an effort to resolve administration of justice implications.

Recognizing the anomaly which occurs when an employee, who is discharged, is cut off from access to an employer's in-house procedures while pursuing, or prior to taking action to pursue, a private remedy with an employer who has a good plan in place, this court said no affirmative defense would be permitted in official act discharge situations. This Court categorized a discharge for discriminatory purposes as a tangible employment action along with a litany of other impermissible anti employment actions.

This Court's commonsense reasoning was plain to see. An employer who maintains a good antidiscrimination plan and vigorously enforces it, the Court reasoned, should be allowed to demonstrate that affirmative defense, even where potentially liable for a supervisor's actions , so as to permit the jury to find the employer per se, not responsible. Presumably the court assumed that the employee could achieve justice through state actions and/or reinstatement etc. or in other ways, and also apparently felt that a good-faith employer should not be the victim of a bad-faith supervisor where the employer has done everything it can protect the employee's rights including make available an in-house antidiscrimination procedure as a remedy. However, once

upon its availability is a contradiction in terms, and the High Court steps in and says no-the employer can't use that affirmative defense when it, or its agents, discharge a purported victim who ostensibly would make use of the private remedial scheme. Worthy of note here is that in Nancy's case the petitioner is a public employer, and although not at issue in this case, factually our Pennsylvania Courts contain numerous cases where victims claim that an incestuous network of good friends within the Pennsylvania State Police regularly cover up harassment against female employees. In this case, petitioners claim that they investigated the underlying matters, Record 230, and found there was no merit to Suders' allegations. If they did investigate, they never even contacted Nancy Suders for an interview.

Regardless, the visceral logic is simple, two wrongs don't make a right, and an employer, who in good faith, does all in its power to protect an employee from abusive supervisors, should not be excessively punished.

Respondent believes more could be done to defeat the scourge of abusive sexual harassment in the workplace, primarily of women employees by male supervisors who can't seem to understand how a woman feels and what she suffers, if the "aided by agency standard" were transformed into a strict liability standard. However, respondent understands that is not at issue here. But policy wise, such a standard would cause employers to do a far more comprehensive job than is being done now across the country to defeat discrimination and protect our female workforce. The human costs, let alone the economic damage done to our economy by unproductive litigation in this field,

more of a legislative issue which is not the province of our courts who have labored diligently to deal with these conflicting private and governmental interests.

In sum the question before this court may be simpler than the parties and their advocates make it appear. As a matter of commonsense, it seems difficult to impossible to expect an employee to use an employer's antidiscrimination procedures when they've been dismissed. As a non-employee, how can they utilize the procedural advantages of an employer's plan? The fact is they can't. So it's simple to understand that if the employee has been formally fired, either as a result of a simple sex discrimination act or as an ultimate form of sexual harassment, she can't use the employers antidiscrimination plan to vindicate her rights. And so it simply follows that the employer can't assert the affirmative defense where one of the components of the affirmative defense rests on the employee's affirmative burden to utilize an employer's plan she doesn't have access to. Thus, no one who addresses this issue would dare suggest, for fear of sounding foolish, that where the employee is formally fired she should be required to respond to an affirmative defense she could not possibly defeat. Commonsense, simple logic. Naturally, the Supreme Court knew what it was doing when it devised the affirmative defense. And of course it assumed that the worker would be on-the-job to take advantage of an antidiscrimination plan, and that if the employee didn't, they ran the risk of having to explain why they didn't do so to a fact finder. The idea ensconced two goals. Not just resolving sexual harassment problems in the workplace but mitigating the problems before they became severe. And, as referred to above, the idea was to encourage the nation' s employers to address a

growing workplace problems. An expected tangential benefit would be a positive impact on the administration of justice. While agency principles served as a legal fiction to ensure employer compliance with the law's practical and policy objectives, through insisting that employers take responsibility for their supervisor's actions, there was also a reward for those who took the horrific effect of workplace sexual harassment on women seriously, and did something about it. Last, by placing a burden on employees, and presumably on their collective bargaining agents, where applicable, the *Ellerth/Faragher* affirmative defense puts a burden on the employee to capitalize on the employer' s antidiscrimination efforts. The ultimate feature of the affirmative defense is that it encourages the education of low level supervisors, and the workforce also, about the employer's plan, to be meaningful. As an alternative to strict liability, where the top brass were not individually involved or personally responsible for the supervisor' s abusive behavior, the Court, in effect said, put a good plan in place, administer and enforce it properly, and should a supervisor abrogate his responsibility, follow the plan to remedy the situation and presumably resolve and remedy the employee's injuries. Further, should it come to litigation, you'll be able to raise this defense and let the fact finder decide if the employee reacted reasonably to the availability of the antidiscrimination plan. But once more, if you fire the employee, you can't raise the defense.

Into this relatively simple circumstance came the constructive discharge. What happens when an employee is forced off the job by intolerable harassment? At this point the factual thicket becomes more complicated. A formal firing is easy. The facts are plain. A fact finder can weigh

the circumstances and make a decision as to whether the dismissal was an act of harassment or one of discrimination discrimination. But making that decision becomes fraught with subjective considerations when the employee complains that she just can't take it anymore, or that circumstances compelled her to leave in the face of unreasonable harassment. This will always be a fact specific determination. If an apocalyptic hiatal occurrence takes place which makes it clear to the unaided eye that no sensible person could deal with the harassment, then few would argue that a constructive discharge is not the legal equivalent of a formal discharge. Naturally, in cases where a plaintiff complains that they "just can't take it anymore" proving the constructive discharge may be far more difficult. However, that's what judges and juries are for. Enter stage Left, making the transition from work place facts, to a case and controversy as a matter of law, is the "tangible employment action". One of a litany of prohibitions appearing in *Ellerth* and *Faragher*, lest the employer's enjoyment of the affirmative defense be denied, a tangible employment action was defined as a "significant change in employment status," generally resulting in economic injury (*Ellerth* at 761-62, *Faragher* at 808). Included in the list was " firing". The Third Circuit reasoned in the opinion appealed from, that assuming a constructive discharge was proved, a constructive discharge being the functional equivalent of a formal discharge, that it necessarily followed that the affirmative defense would not be available to an employer for their supervisor's excesses pursuant to the "aided in agency standard" enunciated in the Restatement of Agency section 219(2)(d). Any other result, reasons the Third Circuit, is not consistent with *Ellerth/Faragher* and a host of

interrelated decisions of this Court, other circuits and district courts throughout the land. Respondent would add that equating a constructive discharge, which is, after all, an obvious euphemism for being forced through mistreatment by your supervisor, to quit against your will, with a formal firing, which is being overtly ordered by your supervisor to quit against your will, is like choosing to die by the gun or the knife. It is a Hobbesian choice, the pain's the same, and you're just as dead. So we come to a simple plain choice, namely, is a constructive discharge a "tangible employment action" like an "official act" discharge, or is it different, and if it's different what identifiable common and material characteristics separate an official act discharge from a constructive discharge such that we can fashion a rule of law around the difference which furthers the objectives of Title VII policy. There are none. The petitioner and its amicae employ a number of red herrings in their arguments in support of treating a constructive discharge differently from an official discharge in the context of the *Ellerth/Faragher* affirmative defense. Their argument is weak. The strategy is to admit the obvious i.e. that an official act discharge, because it cuts off access to the plan, denies the employer access in return to the affirmative defense. But then petitioner engages in a legal sophistry. Attempting to obfuscate a factually insignificant difference between officially dismissing an employee and forcing the employee to leave through egregious mistreatment, the petitioner attempts to focus the argument on the reasonable person standard in constructive discharge cases by saying that the employees " reaction" "does not change the nature of the supervisor's actions for purposes of agency law". Well of course it doesn't. But that's not the point. The point is what

effect the supervisors actions have on the employees option, indeed burden, to exploit the anti-discrimination plan which is one leg of the affirmative action defense. But more cogently, the supervisor' s actions for purposes of agency law, bears no relation at all to the supervisor' s egregious actions which cause an involuntary quit or a pretexual termination based on sex discrimination. A formal discharge as an act of sex discrimination, in which case the affirmative defense would be denied, is no different than a false inquisition threatening criminal charges and arrest resulting in a forced resignation. That is what we are comparing in this case, not a non- tangible employment action which does not invoke the specter of the affirmative defense because presumably the employer's plan is in effect and being used, as against a supervisor' s actions which are on the prohibited list in *Ellerth* at page 761. Petitioner makes just such an apples and oranges argument on page 20 of its brief. Petitioner argues that" in fact it is clear that harassment which leads an employee to resign is not the kind of injury which only a supervisor can cause". Of course not. Co-workers can cause this kind of injury. A high company official removed from intimate contact with the workplace can cause this kind of injury. But those are factual distinctions awaiting resolution in individual cases. As a general rule, it's not that these injuries are typically caused by supervisor's, which we know they are, which dictates the general rule itself, it's the perpetrator armed with the authority of the employer as defined by the "aided in agency standard" which is determinative. It's axiomatic that co-workers lack employer authority by definition, therefore, ostensibly, the affirmative defense would be available. So too with vendors in most cases, or with any other entity over

which the employer maintains no managerial control. These arguments are red herrings designed to focus attention on the employee's reaction, criticizing as it were, by omission, the reasonable person standard, instead of properly focusing on the supervisor's conduct and the supervisor's authority which is the mix this court identified as material to the availability of the affirmative defense not a scope of employment argument. Not fooled by these entreaties the Third Circuit concluded that a constructive discharge, if proved, is a tangible employment action within the holding of *Ellerth/Faragher* and consequently the *Ellerth/Faragher* affirmative defense is not available to the employer in such cases.

Consequently, in response, Nancy Suders would ask this court to eliminate completely the affirmative defense written into Title VII law by *Ellerth/Faragher* for the simple reason that an employer can and should take serious steps to put a command emphasis on the elimination of sexual harassment in the workplace. If employees truly did so the problem would shrink. As the evidence in this case shows the petitioner cared very little about making their program available to affected employees, or in doing anything about the horrific harassment suffered by respondent. And when the District Court looked at the facts, it interpreted the affirmative defense as an opportunity for summary judgment, leaving Nancy Suders without any remedy. Furthermore, because litigation does not, or rarely does, present plaintiffs generally with a sufficient opportunity to truly explore an employer's, always touted, commitment to their antidiscrimination plan, it is rarely possible to get before a court what the employer's performance in enforcing their plan has been generally let alone the past track record

of the supervisor's, which in counsel's experience is typically hidden or unavailable. Respondent realizes this may be beyond the simple form of the question before this court but feels duty-bound to make this request based upon her experiences and the nature of the petitioner's conduct along with that of petitioner's supervisor's.

II. A constructive discharge is a tangible employment action when it results from a hostile work environment created by a supervisor

The question in this case embodies two distinct (although interrelated) legal issues: (1) Under what circumstances is an employer liable for constructive discharge? (2) Is an employer liable for a hostile work environment if it contributes to, or culminates in a subsequent constructive discharge?

For more than three decades the lower courts have been in agreement that the constructive discharge of an employee can violate Title VII. Prior to *Faragher* and *Ellerth*, employers were generally regarded as liable for a constructive discharge precipitated by a supervisor, without regard to the particular type of discriminatory practices which had led to that resignation.[1]

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[1]That construction of Title VII remains codified in the EEOC's Interpretive Manual:

> Respondent is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party. . . . If an employee resigns because (s)he is being subject

That Title VII embodies a protection against constructive discharge is not in dispute. Petitioners apparently acknowledge that an employer would be liable for many unlawful constructive discharges, including those caused by actions such as a discriminatory demotion, transfer, denial of promotion, or reduction in pay[2]. Petitioners agree as well, and the United States insists, that an employer would be liable for harassment-based constructive discharge if the harassment that led to the employee's resignation involved to a significant degree some express use of a supervisor's official authority.[3]

Petitioners contend, however, that an employer should be able to defeat at least some[4] other claims of harassment-based constructive discharge by invoking the affirmative defense established by this Court's decisions in *Faragher* and *Ellerth*. But that affirmative defense was expressly established only for claims for "an actionable hostile work environment." *Faragher*, 514 U.S. at 807. The defense should not be extended to constructive discharge or other Title VII claims.

> to racial harassment and the resignation is directly related to that harassment, the Commission will view the resignation as a constructive discharge.

Section 612.9(a).

[2]All of these discriminatory acts would necessarily involve a use of a supervisor's official power.

[3]Pet. Br. 20-24.

[4]Petitioners correctly note that an employer would be liable for harassment that involved any acts by a supervisor for which an employer would be liable under any other agency principles (e.g actions within the scope of the supervisor's employment). (Pet. Br. 20 n. 14).

For 30 years the lower courts have been resolving cases under federal anti-discrimination laws in which an employee asserted that he or she was constructively discharged. Those courts have been essentially unanimous in agreeing that a constructive discharge can violate Title VII or other federal employment laws, and the EEOC has long endorsed that view. There remain some differences among the lower courts about the standard that must be met to establish an unlawful constructive discharge.

The past decisions of this Court have not undertaken to determine the essential elements of a Title VII constructive discharge case. The instant case does not necessarily require the Court to resolve the substantive elements of a constructive discharge claim, but an evaluation of whether an employer would be liable for a constructive discharge does require an understanding of the distinct types of circumstances in which such claims arise.

The phrase "constructive discharge" has its roots in early decisions under the National Labor Relations Act, after which Title VII was modeled. In the context of disputed union organizing campaigns, employers at times sought to dismiss union activists and sympathizers, both to remove workers who openly favored a particular union, and to deter other employees from doing so. The NLRA expressly forbids the dismissal of an employee because he or she had engaged in protected pro-union activity. In an effort to evade that prohibition, supervisors frequently used harassment and other adverse actions for the purpose of pressuring union sympathizers to resign.

The National Labor Relations Board sensibly concluded that the statutory prohibition against retaliatory discharges could not be evaded in this manner. The Board

came to describe workers removed in this manner as having been "constructively discharged", a phrase which emphasized that the supervisor's actions were in substance, although not in form, a discharge. As the NLRB explained in a 1964 decision, a "resignation," under pressure and scare . . . is treated for legal purposes the same as an actual discharge, although it is sometimes referred to as a 'constructive discharge.'" *The Coachman's Inn,* 147 NLRB 278, 304 (1964). By the time that Title VII was modeled after the NLRA and enacted, the NLRB's constructive discharge doctrine was well established. The Board summarized those decisions in *Crystal Princeton Ref. Co.,* 222 NLRB 1068 (1976):

> "There are two elements which must be proven to establish a constructive discharge. First, the burden imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities."

222 NLRB at 1069.

From the outset constructive discharge claims under Title VII have fallen into two distinct categories.[5] In some instances, as occurred under the NLRA, a supervisor acted with the intent of inducing the resignation of a worker whom

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[5] *Jackson v. Arkansas Dept. of Education*, 272 F. 3d 1020, 1026 (8th Cir. 2002)("to be liable, the employer must have intended to force the employee to quit, or at least have reasonably forseen the employee's resignation as a consequence of the unlawful working conditions it created.")

the supervisor wanted to get rid of. For example, a supervisor who wanted to dismiss an employee for having filed a Title VII charge, or having engaged in other activities protected by section 704, might attempt to achieve the same result through creating oppressive working conditions.[6] Or a supervisor might declare his intent to fire a worker, with the intent of inducing the employee to quit before she was discharged.[7]

The EEOC, and the lower courts, have held that an employer could be liable for a resignation forseeably induced by unlawful discriminatory practices just as the employer would be liable for the dismissal of the employee. In this category of cases liability was imposed, not because a supervisor had deliberately sought to induce a resignation, but because the resignation was a foreseeable result of

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[6]E.g., EEOC Decision 70-683 (1970)(after charging party filed a complaint with the Colorado Civil Rights Commission, plant guards kept him under constant surveillance "intended to force Charging Party to resign"; "[a]ccordingly, the Commission concludes that Charging Party was constructively discharged.").

[7] EEOC Decision 71-1413 (1971)(charging party resigned after she became pregnant in fact of policy of her airline employer of dismissing female flight hostesses who were pregnant; charging party "thus was constructively discharged."); EEOC Decision 71-1545 (1971)(supervisor told charging party he wanted her to stay on the job only if she "stopped 'pestering for equal rights'"; "by leading Charging Party to believe that she had either to forgo her protected rights to oppose discrimination or forgo her employment, Respondent constructively discharged her.")

discriminatory acts or conditions.[8] In attempting to ascertain whether a resignation was foreseeable, the courts have often

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[8]EEOC Decision No. 72-2062 (1972)(African-American workers confined to poorly paid department with no possibility of promotion to better-paid all-white jobs. Charging party resigned after concluding there was no possibility of any promotion. "Thus Charging Party's resignation was directly related to Respondent's unlawful employment practices, and we conclude that in circumstances such as the ones presented by the instant case, the resignation was a foreseeable consequence of those unlawful practices and constitutes a constructive discharge.")(emphasis added); EEOC Decision No. 72-0779 (1971)(charging party was denied promotion because of race, called a "nigger" by a supervisor, and then reprimanded for a non-existent transgression because of his race; "We find that the resignation was a foreseeable effect of the racially discriminatory reprimand and, as such, amounted to a constructive discharge because of race."); EEOC Decision No. 72-1114 (1972)(charging party's supervisor attempted to convert him to a particular religion, and charging party believed his job security was imperiled by his rejection of those efforts; "the resignation of [the] Charging Party . . . constitutes a constructive discharge because of the unlawful factors precipitating his actions."); EEOC Decision No. 72-0661 (1971)(charging party who contacted the NAACP about a layoff was admonished by her supervisor that her actions would "stir up trouble" and would "hurt" her; "we infer that she quit because of the words uttered by her supervisor . . . . We conclude that Charging Party was thus constructively discharged."); EEOC Compliance Manual, § 612.9(a)("If the resignation is directly related to the respondent's unlawful

inquired whether a reasonable person would have resigned under similar circumstances. That is a sensible inquiry, because it would not ordinarily be foreseeable that a the victim of discrimination would respond in an unreasonable manner.

The EEOC and lower courts often characterized such foreseeable resignations as "constructive discharges." This was an understandable but semantically strained extension of the same phrase used in NLRA cases, because the rationale for imposing liability in this second category of cases has nothing to do with any scheme to discharge the worker. The imposition of liability in these cases is consistent with the general practice of imposing liability for the foreseeable consequences of any unlawful discrimination. For example, where an employer's overt practice of promoting only whites deters minority workers from even seeking a traditionally all-white job, those deterred workers receive the same relief as rejected applicants. *Teamsters v. United States*, (citations omitted) Such deterred workers are not characterized as having been "constructively denied promotions"; the phrase "constructive discharge," however, continues to be used to describe foreseeable discrimination-induced resignations.

The use of the single phrase "constructive discharge" to describe what are in reality two distinct theories of liability has bred a significant degree of confusion among the lower courts. Some decisions have recognized only a single hybrid theory of liability, requiring a plaintiff to prove both that the supervisor intended to induce a resignation (the touchstone of the first type of constructive discharge cases) and that the resignation was reasonable or foreseeable (the touchstone of the second

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employment practices, it is a foreseeable consequence of those practices and constitutes a constructive discharge.")

type of constructive discharge cases). Other decisions have fashioned a different type of hybrid, in which the foreseeability of a resignation is deemed sufficient to demonstrate an intent to coerce a resignation. There are, without doubt, instances in which both foreseeability and intent are present. But a sound analysis of the issues in this case is facilitated by a recognition that the phrase "constructive discharge" can refer to either of two distinct types of problem and theories of liability.

(1) Harassment By A Supervisor Is "Aided By The Existence of The Agency Relation"

This Court held in *Faragher* and *Ellerth* that an employer's liability for workplace discrimination must generally be based on agency principles. An employer is liable for the discriminatory acts of a supervisor if the supervisor, in committing those acts, was "aided by the existence of the agency relation", *Faragher*, 524 U.S. at 801 (quoting Restatement (Second) of Agency, § 219(2)(d)), such as actions involving use of a supervisor's position and authority. This Court expressly recognized that even sexual harassment by a supervisor ordinarily involves at least an implicit use of official authority.

> "Several courts, indeed, have noted . . . that there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship. . . . [T]he victim may well be reluctant to accept the risks of blowing the whistle on a superior. When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an

> employee cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise--[which may be] to hire and fire, and to set work schedules and pay rates--does not disappear . . . when he chooses to harass through insults and offensive gestures . . . ." Supervisors do not make speeches threatening sanctions . . . and yet every subordinate employee knows that sanctions exist."

Faragher, 524 U.S. at 805. "[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Ellerth*, 524 U.S. at 763.

That implicit use of supervisory authority is of even greater importance in constructive discharge cases. Most harassment does not result in the resignation of the victim. Harassment victims are likely to resign only where the harassment is particularly serious or protracted, or where the victim can avoid discharge or other discriminatory reprisals only by submitting to sexual demands. As a practical matter, it is far more probable that a supervisor, rather than a co-worker, would engage in the type of harassment that would lead a victim to resign.

Decisions in the lower courts reflect just this distinction. In harassment cases in which the lower courts have considered whether a constructive discharge constitutes a tangible employment action, the harasser was almost

invariably a supervisor. We have identified 18 such decisions in the courts of appeals. In all of those cases the harassers included a supervisor, and in 16 of those instances of asserted constructive discharge all of the harassers were supervisors.

Often the more serious the harassment, the greater the likelihood that the victim will complain, that the employer will take the complaint seriously, and that the perpetrator will be disciplined. But the increased risk of discipline that is likely to deter a fellow worker from more serious harassment may not exist where the harasser is a supervisor. Supervisors may believe, at times with good reason, that their managerial status will enable them to engage in egregious forms of harassment without being dismissed or otherwise disciplined. A supervisor may correctly understand that he (unlike a peer harasser) is more important to the employer than a subordinate victim, and that the employer may thus be inclined to discredit allegations by that subordinate. The supervisor (unlike a peer harasser) frequently will outrank in authority, stature and compensation the personnel official responsible for investigating a harassment charge. Under those circumstances the supervisor may be protected by his agency position from discipline for engaging in the type of serious harassment that a peer harasser could not expect to get away with.

(2) The Affirmative Defense Established by Faragher and Ellerth Should Be Narrowly Construed

Despite the fact that sexual harassment by a supervisor is ordinarily aided by the perpetrator's official position, the affirmative defense recognized by *Faragher* and *Ellerth* may permit an employer to avoid liability for a hostile work environment created by the misuse of that authority. The

EEOC has correctly noted that "[h]arassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability, and that limitation must be construed narrowly."[9]

Faragher and *Ellerth* held only that the affirmative defense they recognized could be invoked to defeat "vicarious liability . . . for an actionable hostile environment created by a supervisor." *Faragher, 524 U.S. at 807; Ellerth,* 514 U.S. at 765. Neither decision purported to determine whether that defense should be extended as well to constructive discharge claims related in some way to earlier harassment. The reasoning of *Faragher* and *Ellerth* does not require or support such an extension of the affirmative defense.

Several important considerations support a narrow construction of the scope and reach of the *Faragher/Ellerth* affirmative defense. First, that defense--although warranted by the considerations noted on those cases--does represent a departure from normal agency principles. If the affirmative defense does apply to a harassment-based constructive discharge claim, a plaintiff would not be able to rely on any implicit use of authority, but would have to show that the perpetrator expressly invoked or exercised official authority. Second, any expansion of the applicability of the affirmative defense will shorten the deadline by which an aggrieved employee must bring discrimination to the attention of the employer, a result that would be at odds with the express decision of Congress to afford employees 180 (or 300) days to do so. Third, application of the affirmative defense to a harassment-based constructive discharge would have the

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[9]EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, part V B.

paradoxical consequence--not present in a simple hostile environment case--that the deadline for complaining about the events that caused the constructive discharge could and frequently would expire before the constructive discharge itself had occurred.[10] (13)

(3) The Reasoning of Faragher and Ellerth Does Not Warrant Extending the Affirmative Defense Established By Those Decisions to Constructive Discharge Cases

Faragher and *Ellerth* frankly recognized that supervisor harassment was aided by the existence of the agency relationship. The Court nonetheless declined to impose, in hostile work environment cases to the same liability that would ordinarily be required by agency principles. The special *Faragher/Ellerth* affirmative defense was adopted for reasons specific to ordinary hostile environment claims, and should not be extended to other types of Title VII violations.

This Court reasoned, first, that the omnipresent implicit use of supervisory authority in a harassment case could not be treated as sufficient to impose liability for a hostile work environment, because it would result in automatic liability in all cases of supervisory harassment. *Faragher,* 524 U.S. at 804. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, --- (1986), had expressly rejected any such automatic liability.

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[10]In the instant case, Suders resigned on August 20, 1988, and filed her Title VII charge (with resulting notice to the employer) in September, 1998. It evidently is petitioner's contention that Suders should have complained (by means of an internal procedure or a Title VII charge) prior to August 20.

The imposition of liability for harassment-based constructive discharges poses no such problem, because it would reach only particularly serious types of harassment. Most cases of harassment--those not resulting in a constructive discharge--would continue to be subject to the affirmative defense.

Second, *Faragher* and *Ellerth* recognized that employers would be more likely to take steps to prevent harassment if the law provided employers with "some . . . incentive" to do so. *Faragher,* 524 at 806; see *Ellerth,* 524 U.S. at 764 (employers would be more likely to take preventative measures if it might affect their liability for harassment.) That purpose is adequately advanced by affording the *Faragher/Ellerth* defense in the more routine harassment cases which do not culminate in a constructive discharge. It is inconceivable that an employer would opt not to create an effective anti-harassment policy, and thus to forgo that defense in <u>all</u> harassment cases, merely because the defense would not extend to the less common cases involving constructive discharges. In the six years since *Faragher* and *Ellerth,* employers had no guarantee that the affirmative defense would extend to constructive discharge cases; no party suggests that that possible limitation has impaired the interest of employers in adopting anti-harassment policies.[11]

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[11]For several years the Eighth Circuit has held that employers are liable, not only for a harassment-based constructive discharge, but for the harassment that preceded it. *Jackson v. Arkansas Dept. of Education,* 272 F. 3d 1020, 1026 (2001). The opposite rule has been followed in the Second Circuit. *Caridad v. Metro-North Commuter Railroad,* 191 F. 3d 283, 294-95 (2d Cir. 1999). No party suggests that this has led to any difference in the willingness of employers in these

The affirmative defense was also fashioned to "encourage employees to report harassing behavior before it becomes severe or pervasive." *Ellerth,* 524 U.S. at 764. The application of that defense to ordinary harassment claims is sufficient to achieve that purpose. A harassment victim otherwise willing to complain about that abuse assuredly would not instead decide to refrain from complaining about sexual harassment in the expectation that the harassment would in time become so egregious or protracted as to trigger a constructive discharge. If a victim feared that harassment would escalate, or continue unabated to the point of a constructive discharge, that fear would provide an important additional incentive to complain. There is no need to go further and threaten the victim with forfeiture of any future constructive discharge claim if she fails to report the abuse.

Petitioner asserts that if the affirmative defense does not apply to constructive discharge claims, it will prompt sexual harassment victims to "<u>hoar[d]</u> . . . their grievances, rather than attempting to resolve them." (Pet. Br. 22)(Emphasis added). That is like suggesting that victims of domestic violence "hoard" their bruises until they have enough to assure their abuser will be convicted of a felony rather than a misdemeanor. To suggest that a victim would deliberately endure a hostile work environment, in the hope that it would get so bad as to force her to resign, is to ignore the often excruciating emotional and psychological harm caused by sexual harassment.

Faragher and *Ellerth* rest in part on the general principle that a discrimination victim must take reasonable steps to avoid or mitigate harm. *Faragher*, 524 U.S. at 806;

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two circuits to adopt anti-harassment plans.

Ellerth, 524 U.S. at 764. But when the victim of sexual harassment is driven to resign, that is often because she or he has concluded that the emotional and psychological harm that would be suffered by remaining on the job (even while awaiting the result of a harassment complaint) outweighs the wages that would be earned. A sexual harassment victim often could reasonably conclude that it would be more prudent to bring the harassment to an immediate and certain end, while running the risk of some delay in finding a new job. Staying on the job and complaining, while retaining the benefits of current employment, means enduring at least some (perhaps considerable) additional harassment while running the risk that a complaint will result in exacerbated harassment (e.g. because the harasser sees that the complaint process failed), retaliation, or dismissal. The statutory cap on compensatory damages under Title VII will at times mean that a harassment victim who has already endured serious harassment will be unable to obtain any additional monetary relief for whatever further harassment she may endure if she remains on the job. Resignation under such circumstances is by its very nature a step to mitigate the harm being suffered. A finding of constructive discharge often will rest on the conclusion by the trier of fact that the victim acted reasonably in mitigating her damages in that manner. *Faragher* and *Ellerth* surely do not mean that a harassment victim must be denied recompense for the incidental costs (back pay) of one form of mitigation (resignation) because she failed also to use some other form of mitigation (an internal complaint).

(4) Extension of the *Faragher/Ellerth* Affirmative Defense to Constructive Discharge Claims Would Raise Intractable Practical Problems

The affirmative defense was also crafted to avoid difficult problems of judicial administration. *Faragher*, 524 U.S. at 807. Extending that defense to constructive discharge claims would create often intractable litigation difficulties. As this case well illustrates, constructive discharges frequently involve a complex mix of supervisory discriminatory actions and motives. The *Faragher/Ellerth* defense could apply, at most, only to some of those violations. Assessing liability in such a situation would involve unraveling a tangled skein of factual disputes, legal issues, and confusing jury instructions.

First, petitioners and the United States repeatedly acknowledge that the affirmative defense would not apply to an express use of company authority. The instant case involves several such actions. On July 22, 1998, Suders received a supervisor's notation for allegedly failing to complete an earlier assignment. On July 26, 1998, she was reprimanded for supposedly having failed to disseminate certain information. Corporal Baker reprimanded Suders for allegedly having taken home a missing file. Suders contended that these exaggerated disciplinary measures were taken against her because of her gender. All of these actions could only have been taken by a supervisor. The events which caused Suders' ultimate resignation were caused solely by her supervisors and their abuse of authority. See Pet. App. 27a " Any shred of doubt, however, is removed when considering the events of Suders' final day on the job...." Sergeant Easton directed a subordinate to dust with the special detection powder (App. 27), directed the corporals to monitor the results (App. 47), and then used his supervisory authority to summon Suders and demanded that she explain her possession of her own test results all the while indicating she was being arrested and was going to be charged criminally. The United States suggests that the use

of such supervisory powers would bar the *Faragher/Ellerth* defense if they constituted a "significant" part of the events leading to the constructive discharge. The government does not explain whether "significance" is to be assessed in light of the portion of the incidents that involved the use of such supervisory power, or the comparative importance of those incidents. Implementation of this distinction would require a complex set of jury instructions, under which the jury would have to determine (a) which incidents involving supervisory power had actually occurred, (b) which of them involved an unlawful motive, (c) which discriminatory incidents not involving use of supervisory power had occurred, and (d) the comparative significance (however defined) of each.

Second, the *Faragher/Ellerth* defense does not apply to actions which were in the scope of the supervisor's employment. If the supervisors were harassing Suders because they objected to a woman holding her job, or found it particularly objectionable that a woman had obtained her position through political connections, that would of course violate Title VII. Frequently harassment of a sexual nature is engaged in for purely personal reasons. But some of the harassment alleged in the instant case was not sexual. The existence of this non-sexual harassment, in turn, raises questions about whether the supervisors engaged in the harassment that was of a sexual nature, not because it provided them with any sexual gratification, but because sexual harassment was an especially noxious way to abuse a female employee to whom they had gender-based objections. All of those issues would have to be sorted out at trial, and weighed by the jury together with other actions to which the *Faragher-Ellerth* defense could not apply.

Third, the affirmative defense requires that an employer establish an effective anti-harassment policy, and that the employer exercise reasonable care to prevent and correct discriminatory harassment. The obligation to correct such harassment is not limited to instances in which the victim files a complaint through the employer's internal complaint mechanisms. To be entitled to the defense, the employer must also exercise reasonable care to address allegations of harassment which it receives from other sources, including from a charge filed with the EEOC, and served by the EEOC on the employer.

The EEOC and the lower courts have recognized that an employer's receipt of a Title VII charge (or similar charge under state law) triggers the employer's obligation under *Faragher* and *Ellerth* to correct unlawful harassment. "[I]f an employee files an EEOC charge alleging unlawful harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process."[12] Where investigation of such a Title VII charge reveals unlawful harassment, the EEOC has insisted that the corrective action under *Faragher* and *Ellerth* should include, where warranted, both reinstatement and "correction of any other harm caused by the harassment (e.g., compensation for losses.)"[13] The obligation to take corrective action does not end merely because the discriminatory conduct forced a charging party to give up her job. He other member See *Robinson v. Shell Oil Co.*, (citations omitted) former employee still an employee within the meaning of Title VII).

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[12]EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, part V C 2.

[13]Id. at V, C, 2.

A Title VII action seeking redress for a constructive discharge cannot be brought unless that plaintiff has first filed with the EEOC (or a state or local EEO agency), and the Commission has in turn provided to the employer, an administrative charge alleging that the plaintiff was the victim of a constructive discharge. That charge, and the resulting EEOC investigation and conciliation, will invariably provide the employer with specific allegations that the charging party was driven from her job by harassment or other abuse. (In the instant case petitioners received written information about the alleged harassment within a few weeks of the constructive discharge.[14]) A *Faragher/Ellerth* defense to a constructive discharge claim could not be sustained without a determination as to whether an employer exercised reasonable care in investigating the allegations of that EEOC charge, and in redressing any identified discrimination.[15]

Fourth, any affirmative defense would necessarily be limited to cases in which the employer's reasonable care, and the employee's unreasonable failure to utilize opportunities provided by the employer, both related to the particular harassment which is the basis of the constructive discharge claim. If a case involves two (or more) sufficiently distinct types of harassment (or perhaps different harassers), the availability of the affirmative defense may have to be assessed separately for each type of harassment. All forms of sexual

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[14]Suders resigned on August 20 , 1998. Within a week she had scheduled an EEOC intake. She filed her Title VII charge on September 18th, 1998. The applicable EEOC regulations required that that charge be provided to petitioners within 180 days.

harassment by a single supervisor would, at least ordinarily, be assessed together. On the other hand, if an employee had acted reasonably in not complaining about one type of harassment (e.g. racial harassment), but had been unreasonable in not complaining about another form of harassment (e.g. sexual harassment), the affirmative defense would apply only to the latter.

Fourth, it would assuredly be inappropriate to permit assertion of the *Faragher/Ellerth* affirmative defense in a case in which a supervisor had harassed (and perhaps otherwise discriminated against the plaintiff) for the purpose of forcing the employee to resign. *Faragher* and *Ellerth* made clear that the affirmative defense would not be available if the harassment "culminates in a . . . discharge." *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765. Where a supervisor, rather than openly dismissing an employee, successfully sets out to achieve the same result by forcing the worker to resign, that action should be treated--as it is under the NLRA--as a dismissal. Any other rule would inevitably invite evasion of the holding in *Faragher* and *Ellerth* that a dismissal precludes assertion of the affirmative defense.

Whether an employer is liable for the injuries caused by a pre-constructive discharge hostile work environment presents a distinct legal issue.

Since this Court's decisions in *Faragher* and *Ellerth*, the lower courts have come to differing conclusions about an employer's liability in such circumstances. The lower courts have felt compelled to resolve this question by attempting to determine whether a constructive discharge is a "tangible employment action" within the meaning of *Faragher* and

Ellerth. The EEOC has in the past maintained that a constructive discharge does constitute a tangible employment action.[16] Petitioners argue for a definition of "tangible employment action" that would exclude constructive discharges.

These arguments, like the analyses in some lower court decisions, have sought to find in *Faragher* and *Ellerth* the answer to a question which simply was not before, and was not decided by, the Court. Precisely because the Court had no occasion to consider the particular significance of a constructive discharge, those decisions contain language that supports conflicting conclusions. *Ellerth*, for example, describes a "tangible employment action" as something that "constitutes a significant change in employment status." 524 U.S. at 761. A constructive discharge certainly fits within that description. Elsewhere, on the other hand, *Ellerth* refers, not to a tangible employment action, but a tangible employment decision, and states that such a decision "requires an official act of the enterprise." 524 U.S. at 762. That formulation is more difficult to apply to a constructive discharge.

Ellerth notes that a tangible employment action "in most cases is documented in official company records, and may be subject to review by higher level supervisors." Id.. An employee's resignation, whether or not the result of a

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[16]Plaintiff EEOC's and Plaintiff-Intervenors' Trial Brief, EEOC v. Crowder Construction Co., Civil Action No. 3:00CV186-V for (W.D.N.C.) p. 3 ("Constructive discharge constitutes a tangible job action because it results in a 'significant change in employment status.' *Ellerth*, 524 U.S. at 761.")

constructive discharge, will almost invariably be reflected in company records. It is subject to review in at least one sense: companies often conduct exit interviews, or make some other form of inquiry, to learn whether a resignation is the result of some employment problem. On the other hand, a constructive discharge is not subject to "review" in the sense that a decision to fire or demote could be appealed to and reversed by higher officials.

Ellerth also observes that "[a]s a general proposition, only a supervisor, or other person acting with the authority of the company" can cause the "direct economic harm" of a tangible employment action. 514 U.S. at 762. Constructive discharge, unlike, for example, emotional distress caused by unwanted sexual touching, does cause a direct economic harm.[17] As we explained supra, in practice, harassment or other discrimination, serious enough to result in a constructive discharge, is usually the result of actions by supervisors, not by peers.

The characterizations of a tangible employment action in *Ellerth* fairly support the conclusion that a constructive discharge should be treated as such an action. There is, however, a more straightforward and compelling basis for resolving this issue. In referring to (and to some degree defining) a tangible employment action, the purpose of this

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[17]See *Ellerth*, 524 U.S. at 760:

> If the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable without any further showing.

(Quoting *Sauers v. Salt Lake County*, 1 F. 3d 1122, 1127 (10th Cir. 1993).

Court's decisions in *Faragher* and *Ellerth* was to delineate the supervisory actions for which an employer would indeed be liable. *Ellerth* 514 U.S. at 760. For the reasons noted above, a constructive discharge brought about by the discriminatory actions of a supervisor, whether or not those actions involve harassment, is a claim for which employers are necessarily liable. Where an employer is liable for the culmination of a supervisor's discriminatory practices, it is entirely appropriate for that liability to encompass as well any earlier harms caused by some or all of the discriminatory actions involved.

CONCLUSION

This Court is respectfully requested to hold that a constructive discharge, if proven constitutes as tangible employment action within the law of *Ellerth/Faragher*.

Respectfully Submitted,

Don Bailey
Bailey Stretton & Ostrowski
4311 N. 6th Street
Harrisburg, Pa 17110
(717) 221-9500